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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 WENDI OPPENHEIMER et al.

12 Plaintiffs,

13 v.

14 THE CITY OF LA HABRA et al.,

15 Defendants.
16

No. SA CV 16-00018-JVS (DFMx)

CERTIFICATION OF FACTS
AND ORDER TO SHOW
CAUSE WHY CHLOE
OPPENHEIMER SHOULD NOT
BE HELD IN CONTEMPT

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18 Nonparty Chloe Oppenheimer ("Oppenheimer") has failed to appear for
19 a deposition and failed to appear in Court to address why she should not be
20 held in contempt for her failure to appear for a deposition. As discussed below,
21 the Court certifies the following facts and orders Oppenheimer to appear
22 before the District Judge to show cause why she should not be adjudged in
23 contempt for failure to comply with a deposition subpoena and associated
24 order. **Oppenheimer is warned that her failure to comply with this Order**
25 **may result in contempt sanctions including deposition fees, attorney's fees,**
26 **and/or her arrest by the United States Marshals Service.**

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STATEMENT OF CERTIFIED FACTS

Plaintiffs filed this lawsuit on January 6, 2016, alleging civil-rights and wrongful-death claims stemming from the January 2, 2015 suicide of Daniel Oppenheimer (“Decedent”), Plaintiffs’ family member, in the La Habra City Jail. See Dkt. 1; see also Dkts. 8, 26 (amended complaints). Nonparty Oppenheimer is Decedent’s biological daughter, Plaintiff Vannes Oppenheimer’s sister, and Plaintiff Wendi Oppenheimer’s stepdaughter. Dkt. 60 (“Lenkov Decl.”) ¶ 6. Defendants seek to depose Oppenheimer “regarding Plaintiffs’ alleged damages and her knowledge as a percipient witness to the relationships between [D]ecedent and Plaintiffs Vannes Oppenheimer and Wendi Oppenheimer.” Id.

On November 2, 2016, investigator Nichole L. Tahmasian personally served on Oppenheimer a subpoena and notice of deposition, compelling her to appear for a deposition at 10:30 a.m. on November 14, 2016, at defense counsel’s office in San Diego. Lenkov Decl. ¶ 3 & Exs. A (subpoena and proof of service) & B (notice of deposition); Dkt. 153-1, Ex. B (Tahmasian Decl.) ¶ 3. Enclosed with the deposition notice was a check for witness fees of \$83.20. Lenkov Decl., Ex. A. Oppenheimer cashed the check later that same day. Dkt. 110-1, Ex. B (copy of endorsed, cashed check). On November 14, 2016, Oppenheimer failed to appear for the deposition. Lenkov Decl. ¶ 5 & Ex. C (reporter’s statement of nonappearance).

On December 6, 2016, Defendants filed a Motion to Compel Compliance with Subpoena of Unrepresented Non-Party Chloe Oppenheimer and Request for Order to Show Cause Why Ms. Oppenheimer Should Not Be Held in Contempt. Dkt. 59 (“Motion”). Defendants did not identify what specific sanctions they sought, nor did they submit an affidavit of attorney’s fees and costs incurred as a result of Oppenheimer’s failure to appear. See id. On December 20, 2016, Plaintiffs opposed the Motion, arguing that it was

1 untimely, among other things. Dkt. 65. On December 23, 2016, Defendants
2 filed a reply. Dkt. 75.

3 On January 9, 2017, the Court denied Defendants' Motion to the extent
4 it sought an order compelling Oppenheimer to appear for a deposition, finding
5 that such an order was not an available remedy against a nonparty. Dkt. 99 at
6 2. The Court granted Defendants' Motion to the extent it sought an order to
7 show cause. Id. In a separate Notice of Hearing and Order to Show Cause Re:
8 Contempt, the Court ordered Oppenheimer to appear at 10 a.m. on January
9 24, 2017, to show cause why she should not be adjudged in civil contempt for
10 failing to comply with the deposition subpoena. Dkt. 100. The Court set a
11 deadline for Oppenheimer to file an opposition to Defendants' Motion and it
12 directed defense counsel to personally serve her with a copy of the notice and
13 order and associated pleadings within 3 business days. Id.

14 On January 10, 2017, investigator Cheryl L. Yocum went to
15 Oppenheimer's home to serve her with the January 9 notice and order and
16 associated documents. See Dkt. 109-1, Ex. B ("Yocum Decl."). Yocum
17 "visually identified . . . Oppenheimer as she exited from her car" but
18 Oppenheimer "refused to accept the documents" and "threatened to contact
19 the police as she walked through the gate to her unit." Id. ¶ 5. Yocum
20 "plac[ed] the documents inside the gate to [Oppenheimer's] unit" and
21 "informed [Oppenheimer] that [Yocum] was placing the documents at the gate
22 and that she had been served." Id.

23 On January 19, 2017, Plaintiffs filed an Objection to the Hearing and
24 Order to Show Cause Re: Contempt, arguing that defense counsel had not
25 properly served Oppenheimer with the January 9 notice and order. Dkt. 109.
26 Defendants filed a response that same day. Dkt. 110.

27 Oppenheimer failed to appear at the hearing on January 24, 2017. Dkt.
28 114. That same day, the Court continued the hearing to February 14, 2017. Id.

1 The Court also issued an Amended Notice of Hearing and Order to Show
2 Cause, ordering Oppenheimer to appear before the Court at 10 a.m. on
3 February 14, 2017, “to show cause why she should not be adjudged in civil
4 contempt of court for failing to comply fully with a deposition subpoena served
5 upon her in this matter.” Dkt. 115. The Court set a date by which
6 Oppenheimer could file an opposition to Defendants’ Motion, and it ordered
7 Defendants to personally serve the amended notice and order and associated
8 pleadings on Oppenheimer within 7 days. Id.

9 On January 26, 2017, investigators Jeffrey Gailey and Michael Foster
10 went to Oppenheimer’s home to serve her with the January 24 notice and
11 order and associated documents. Dkt. 153-1, Ex. B (“Gailey Decl.”) ¶ 3,
12 (“Foster Decl.”) ¶ 4. When Gailey saw Oppenheimer walking to her car, he
13 approached her and “explained that [he] had additional court documents to
14 serve on her” and that “she had been ordered to appear in court on February
15 14, 2017 and that this was a serious matter that needed her attention.” Gailey
16 Decl. ¶ 3; see also Foster Decl. ¶ 4. When Oppenheimer got into her car
17 without responding, Gailey placed the documents on her windshield and
18 walked away. Gailey Decl. ¶ 3; see also Foster Decl. ¶ 4. Oppenheimer then
19 got out of her car, took the documents from the windshield, ran after Gailey,
20 and threw the documents at him. Gailey Decl. ¶ 3; see also Foster Decl. ¶ 4.
21 Oppenheimer returned to her car and drove away. Gailey Decl. ¶ 3; see also
22 Foster Decl. ¶ 4. Foster captured these events on videotape, which the Court
23 has reviewed and found to reflect the events as described. See Gailey Decl. ¶ 3;
24 see also Foster Decl. ¶ 4; Dkt. 153-2.

25 After Oppenheimer drove away, Gailey placed the served documents in
26 her yard. Gailey Decl. ¶ 4; see also Foster Decl. ¶ 5. The next day, he sent an
27 additional copy of the documents to Oppenheimer by first-class mail. Gailey
28 Decl. ¶ 5.

1 Oppenheimer failed to appear for the February 14, 2017 hearing. See
 2 Dkt. 149.

3 DISCUSION

4 Under Federal Rule of Civil Procedure 45(g), a court “may hold in
 5 contempt a person who, having been served, fails without adequate excuse to
 6 obey the subpoena or an order related to it.” This is the only authority in the
 7 Federal Rules of Civil Procedure for the imposition of sanctions against a
 8 nonparty for failure to comply with a subpoena. Pennwalt Corp. v. Durand-
 9 Wayland, Inc., 708 F.2d 492, 494 (9th Cir.1983) (as amended) (discussing
 10 previous version of Rule 45). When a party seeks contempt sanctions against a
 11 nonparty, the nonparty has a right to notice and an opportunity to be heard.
 12 S.E.C. v. Hyatt, 621 F.3d 687, 696-97 (7th Cir. 2010).

13 When an act “constitut[ing] a civil contempt” occurs in a discovery-
 14 related proceeding,

15 [T]he magistrate judge shall forthwith certify the facts to a district
 16 judge and may serve or cause to be served, upon any person whose
 17 behavior is brought into question under this paragraph, an order
 18 requiring such person to appear before a district judge upon a day
 19 certain to show cause why that person should not be adjudged in
 20 contempt by reason of the facts so certified. The district judge shall
 21 thereupon hear the evidence as to the act or conduct complained
 22 of and, if it is such as to warrant punishment, punish such person
 23 in the same manner and to the same extent as for a contempt
 24 committed before a district judge.

25 28 U.S.C. § 636(e)(6); see also Assignment of Duties to Magistrate Judges,
 26 C.D. Cal. Gen. Order 05-07 (2005). In certifying the facts under § 636(e), the
 27 magistrate judge’s role is to determine whether the moving party can assert
 28 sufficient evidence to establish a prima facie case of contempt. See Proctor v.

1 State Gov't of N.C., 830 F.2d 514, 521 (4th Cir. 1987).

2 In the Ninth Circuit, a party alleging that another person should be held
3 in civil contempt must establish by clear and convincing evidence that the
4 alleged contemnor “violated the court order,” “beyond substantial
5 compliance,” “not based on a good faith and reasonable interpretation of the
6 order.” Labor/Cnty. Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth., 564
7 F.3d 1115, 1123 (9th Cir. 2009) (quoting In re Dual-Deck Video Cassette
8 Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993)). Once that prima
9 facie showing is made, the burden shifts to the alleged contemnor to “produce
10 evidence explaining [her] noncompliance.” United States v. Ayres, 166 F.3d
11 991, 994 (9th Cir. 1999) (citing Chairs v. Burgess, 143 F.3d 1432, 1436 (11th
12 Cir. 1998)). In making a contempt determination, a court may consider “the
13 witness’[s] history of non-compliance and the extent to which the witness
14 failed to comply during the pendency of the motion for contempt.” Martinez v.
15 City of Avondale, No. 12-1837, 2013 WL 5705291, at *4 (D. Ariz. Oct. 18,
16 2013).

17 A nonparty’s noncompliance with a subpoena may warrant contempt
18 sanctions. Pennwalt Corp., 708 F.2d at 494 n.5; LHF Prods., Inc. v. Doe, No.
19 16-00716, 2016 WL 6208269, at *2 (D. Or., Oct. 21, 2016). Such sanctions
20 may include the cost of the failed deposition and show-cause motion. LHF
21 Prods., Inc., 2016 WL 6208269, at *2-3. Upon a finding of a willful failure to
22 comply with a court order, a contemnor may be jailed until compliance with
23 the district court’s order. S.E.C. v. Elmas Trading Corp., 824 F.2d 732 (9th
24 Cir. 1987) (“When the petitioners carry the ‘keys of their prison in their own
25 pockets,’ the action is ‘essentially a civil remedy.’”) (quoting Shillitani v.
26 United States, 384 U.S. 364, 368 (1965)); Martinez, 2013 WL 5705291, at *4.
27 A civil contempt order must be accompanied by a “purge” condition, meaning
28 that it must give the contemnor an opportunity to comply with the order before

1 payment of the fine or other sanction becomes due. Koninklijke Philips Elec.
 2 N.V. v. KXD Tech., Inc., 539 F.3d 1039, 1042-43 (9th Cir. 2008); Martinez v.
 3 City of Pittsburg, No. 11-01017, 2012 WL 699462 at *3 (N.D. Cal. Mar. 1,
 4 2012); see also Shell Offshore v. Greenpeace, Inc., 815 F.3d 623, 629 (9th Cir.
 5 2016) (“the ability to purge is perhaps the most definitive characteristic of
 6 coercive civil contempt”).

7 Here, Defendants have shown by clear and convincing evidence that
 8 Oppenheimer failed to comply with both the original deposition subpoena and
 9 the Court’s later order to appear and show cause. First, Oppenheimer was
 10 personally served with the deposition notice and subpoena and cashed the
 11 check for witness fees, but she nevertheless failed to appear for the deposition
 12 or otherwise respond to the notice and subpoena. Second, Oppenheimer was
 13 personally served with the Court’s January 24, 2017 amended notice of hearing
 14 and order to show cause, but she failed to appear for the February 14 hearing.
 15 Plaintiff has also displayed a history of attempting to avoid service of pleadings
 16 and Court orders. For all of these reasons, the undersigned certifies the facts
 17 stated above.

18 ORDER

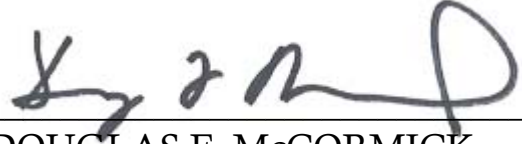
19 IT IS THEREFORE ORDERED that Chloe Oppenheimer appear
 20 before the Honorable James V. Selna in Courtroom 10B, Tenth Floor, United
 21 States District Court, 411 West 4th Street, Santa Ana, California, 92701-4516,
 22 on February 27, 2017, at 10 a.m., to show cause why she should not be
 23 adjudged in contempt by reason of the facts certified herein. Should
 24 Oppenheimer arrange with Defendants’ counsel (Andrew Michael Mallett,
 25 Manning and Kass Ellrod Ramirez Trester LLP, 801 South Figueroa Street,
 26 15th Floor, Los Angeles, CA 90017, Tel: 213-624-6900, email:
 27 azm@manningllp.com) before February 27, 2017, to arrange to have her
 28 deposition taken, the parties shall notify the court immediately and the

1 February 27, 2017 hearing will be vacated and Oppenheimer will not need to
2 appear.

3 **Oppenheimer is again warned that her failure to comply with this**
4 **Order may result in contempt sanctions including deposition fees, attorney's**
5 **fees, and/or her arrest by the United States Marshals Service.**

6 The United States Marshals Service is directed to personally serve a
7 signed copy of this Order on Chloe Oppenheimer as soon as practicable at 421
8 North Horne Street, Oceanside, California 92054, or at any other address
9 where she may be located. The United States Marshals Service shall promptly
10 file a return of service upon service of this Order.

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12 Dated: February 17, 2017

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15 DOUGLAS F. McCORMICK
16 United States Magistrate Judge
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